fended in litigation, so long as the final classification judgment was made under that order.[12]

Prior to examining the standard of review applied by courts in Exemption 1 cases, and the specific changes to the classification system now called for under Executive Order 12,958, it is useful to review briefly the early decisions construing this exemption, as well as its legislative history. In 1973, the Supreme Court in EPA v. Mink[13] held that records classified under proper procedures were exempt from disclosure per se, without any further judicial review, thereby obviating the need for in camera review of information withheld under this exemption.[14] Responding in large part to the thrust of that decision, Congress amended the FOIA in 1974 to provide expressly for de novo review by the courts and for in camera review of documents, including classified documents, where appropriate.[15] In so doing, Congress apparently sought to ensure that national security records are properly classified by agencies and that reviewing courts remain cognizant of their authority to verify the correctness of agency classification determinations.[16]

Standard of Review

After the FOIA was amended in 1974, numerous litigants challenged the sufficiency of agency affidavits in Exemption 1 cases, requesting in camera review by the courts and hoping to obtain disclosure of challenged documents. Nevertheless, courts initially upheld agency classification decisions in reliance upon agency affidavits, as a matter of routine, in the absence of evidence of bad faith on the part of an agency.[17] In 1978, however, the Court of Appeals for the District of Columbia Circuit departed somewhat from such routine reliance on agency affidavits, prescribing in camera review to facilitate full de novo determinations of Exemption 1 claims, even when there was no showing of bad faith

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[12] See, e.g., Keenan, No. 94-1909, slip op. at 7 (D.D.C. Mar. 24, 1997) (finding that although agency could "voluntarily reassess" its classification decision under Exec. Order No. 12,958, issued during pendency of lawsuit, agency not required to do so); see also FOIA Update, Spring/Summer 1995, at 12. But cf. FOIA Update, Spring/Summer 1995, at 4, 12 (summarizing history of Exemption 1 disclosure orders and urging careful attention to classification determinations accordingly).

[13] 410 U.S. 73 (1973).

[14] Id. at 84.

[15] See 5 U.S.C. § 552(a)(4)(B).

[16] See H.R. Rep. No. 93-876, at 7-8 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6272-73, and in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents 121, 127-28 (1975).

[17] See, e.g., Weissman v. CIA, 565 F.2d 692, 698 (D.C. Cir. 1977).

on the part of the agency.[18] This decision nevertheless recognized that the courts should "first `accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'"[19]

The D.C. Circuit further refined the appropriate standard for judicial review of national security claims under Exemption 1 (or under Exemption 3, in conjunction with certain national security protection statutes), finding that summary judgment is entirely proper if an agency's affidavits are reasonably specific and there is no evidence of bad faith.[20] Rather than conduct a detailed

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[18] Ray v. Turner, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978).

[19] Id. at 1194 (quoting legislative history).

[20] See Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); see, e.g., Cohen v. FBI, No. 93-1701, slip op. at 4 (D.D.C. Oct. 11, 1994) (rejecting plaintiff's argument that contradictions in agency's affidavit demonstrate "intentional misrepresentations" requiring release of classified information at issue); Canning v. United States Dep't of Justice, 848 F. Supp. 1037, 1042-43 (D.D.C. 1994) (applying Halperin standard); see also Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992) (Exemption 3); Levy v. CIA, No. 95-1276, slip op. at 15-16 (D.D.C. Nov. 16, 1995), summary affirmance granted, No. 96-5004 (D.C. Cir. Jan. 15, 1997) (Exemption 3); cf. Voinche v. FBI, 940 F. Supp. 323, 328 (D.D.C. 1996) (granting summary judgment despite "troubling" and "vague" affidavits in light of thoroughness of agency's other submissions and fact that Vaughn affidavits in Exemption 1 cases "inherently require a degree of generalization" to prevent compromise of national security interests), aff'd per curiam, No. 96-5304, 1997 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997), petition for cert. filed, 66 U.S.L.W. 3178 (U.S. Sept. 2, 1997) (No. 97-383); Ajluni v. FBI, 947 F. Supp. 599, 607 (N.D.N.Y. 1996) (rejecting plaintiff's request for discovery of procedure by which documents are classified because Vaughn Index "sufficient"); Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 3-4 (D.D.C. Mar. 2, 1993) (denying discovery in FOIA lawsuit involving Exemption 1 because affidavits "relatively detailed, . . . nonconclusory and submitted in good faith"). But see Oglesby v. United States Dep't of the Army, 79 F.3d 1172, 1179-84 (D.C. Cir. 1996) (rejecting as insufficient certain Vaughn Indices because agencies must itemize each document and adequately explain reasons for nondisclosure); Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 807 (9th Cir. 1995) (in affirming district court disclosure order, finding government failed to show with "any particularity" why classified portions of several documents should be withheld), cert. dismissed, 116 S. Ct. 833 (1996); Wiener v. FBI, 943 F.2d 972, 978-79 (9th Cir. 1991) (rejecting as inadequate agency justifications contained in coded Vaughn affidavits, based upon view that they consist of "boilerplate" explanations not "tailored" to particular information being withheld pursuant to Exemption 1); Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.12 (D.C. Cir. 1990) (noting degree of specificity required in public Vaughn affidavit in Exemption 1 case, especially with regard to agency's obligation to segregate and release nonexempt material); Springmann v. United States Dep't of State, No. 93-1238, slip op. at 9-11 (D.D.C. Apr. 21, 1997) (denying

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inquiry, the court deferred to the expert opinion of the agency, noting that judges "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case."[21] This review standard has been reaffirmed by the D.C. Circuit on a number of occasions,[22] and it has been adopted by other circuit

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[20](...continued)
summary judgment regarding two paragraphs in Riyadh Embassy compliance review because court saw no "logical connection" in declaration between national security and information that American employee engaged in religiously offensive behavior in Saudi Arabia), renewed motion for summary judgment denied without issuance of final judgment (D.D.C. Aug. 6, 1997); Keenan v. Department of Justice, No. 94-1909, slip op. at 8-11 (D.D.C. Mar. 24, 1997) (finding insufficient coded Vaughn Index which merely recites executive order's language without providing information about contents of withheld information) (renewed motion for summary judgment pending); Scott v. CIA, 916 F. Supp. 42, 44-49 (D.D.C. 1996) (finding CIA's affidavits "inadequate" because they "fail to provide any description of the nature or type of material redacted, much less justify the redaction by explaining how the . . . information withheld meets the requirements of the exemption").

[21] Halperin, 629 F.2d at 148; see also Bowers v. United States Dep't of Justice, 930 F.2d 350, 357 (4th Cir. 1991) (stating that "a court should hesitate to substitute its judgment of the sensitivity of the information for that of the agency"); Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (emphasizing deference due agency's classification judgment).

[22] See, e.g., Krikorian v. Department of State, 984 F.2d 461, 464 (D.C. Cir. 1993); King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987) (concluding that "the court owes substantial weight to detailed agency explanations in the national security context"); Goldberg v. United States Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987); see also Linn v. United States Dep't of Justice, No. 92-1406, 1995 WL 631847, at *26 (D.D.C. Aug. 22, 1995) (indicating that role of courts in reviewing Exemption 1 claims "is to determine whether the agency has presented a logical connection between its use of the exemption and the legitimate national security concerns involved; the Court does not have to ascertain whether the underlying facts of each specific application merit the agency's national security concerns"); Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 802-03 (D.D.C. 1992) (rejecting plaintiff's attack that coded Vaughn Index constituted inadequate "boilerplate," especially given "nature of underlying materials" which purportedly concern assassination of prime minister of friendly country), aff'd in pertinent part, 23 F.3d 548, 553 (D.C. Cir. 1994); Washington Post v. DOD, 766 F. Supp. 1, 6-7 (D.D.C. 1991) (declaring that judicial review of agency's classification decisions should be "quite deferential"); National Sec. Archive v. FBI, 759 F. Supp. 872, 875 (D.D.C. 1991) (explaining that government's burden to demonstrate proper withholding of material is "relatively light" in Exemption 1 context because court is required to "accord substantial weight to determination of [agency] officials"); cf. Department of the Navy v. Egan, 484 U.S. 518, 529-30 (1988) (allowing deference to agency expertise in granting of security clearances) (non-FOIA case).

courts as well.[23]

Indeed, if an agency affidavit passes muster under this standard, in camera review may be inappropriate because substantial weight must be accorded that affidavit.[24] In a recent decision, the D.C. Circuit stated that in a national security

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[23] See, e.g., McDonnell v. United States, 4 F.3d 1227, 1242-44 (3d Cir. 1993) (finding summary judgment appropriate when agency's affidavits reasonably specific and not controverted by contrary evidence or showing of bad faith); Maynard v. CIA, 986 F.2d 547, 555-56 & n.7 (1st Cir. 1993) (recognizing "substantial deference" so long as withheld information logically falls into exemption category cited and there exists no evidence of agency "bad faith"); Bowers, 930 F.2d at 357 (stating that "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts"); Patterson v. FBI, 893 F.2d 595, 601 (3d Cir. 1990) (asserting that "courts are expected to accord `substantial weight' to the agency's affidavit"); cf. Hunt, 981 F.2d at 1119 (applying similar deference in Exemption 3 case involving national security). But see Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996) (providing for additional element to summary judgment analysis in FOIA cases by first requiring appeals court to determine whether district court had "adequate factual basis upon which to base its decision" before undertaking de novo review (citing Painting Indus. of Haw. Mkt. Recovery Fund v. United States Dep't of the Air Force, 26 F.3d 1479, 1482 (9th Cir. 1994); Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996))) (Exemption 3).

[24] See, e.g., Doherty v. United States Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985) (adjudging that "the court should restrain its discretion to order in camera review"); Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979) (stating that "[w]hen the agency meets its burden by means of affidavits, in camera review is neither necessary nor appropriate"); Public Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995) (declining in camera review of withheld videotapes after according substantial weight to agency's affidavit that public disclosure would harm national security); King v. United States Dep't of Justice, 586 F. Supp. 286, 290 (D.D.C. 1983) (characterizing in camera review as last resort), aff'd in part & rev'd in part on other grounds, 830 F.2d 210 (D.C. Cir. 1987); cf. Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992) (holding that district court did not abuse its discretion by refusing to review documents in camera--despite small number--because agency's affidavits found sufficiently specific to meet required standards for proper withholding). But see, e.g., Patterson, 893 F.2d at 599 (finding in camera review of two documents appropriate when agency description of records was insufficient to permit meaningful review and to verify good faith of agency in conducting its investigation); Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980) (holding that conclusory affidavit by agency requires remand to district court for in camera inspection of 15-page document); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 4-8 (D.D.C. July 28, 1995) (ordering in camera review of 4 of 17 documents at issue because government's explanation for withholdings insufficient, but denying plaintiff's request that court review documents merely because government subsequently released previously withheld material), aff'd on other grounds, 97 F.3d 575 (D.C. Cir. 1996); Moore v. FBI,

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case, a district court exercises "wise discretion" when it limits the number of documents it reviews in camera.[25] In upholding the district court's decision not to review certain documents in camera, the D.C. Circuit opined that limiting the number of documents examined by a court "makes it less likely that sensitive information will be disclosed" and, if there is an unauthorized disclosure of classified information, "makes it easier to pinpoint the source of the leak."[26]

In another case, the Court of Appeals for the Seventh Circuit analyzed the legislative history of the 1974 FOIA amendments and went so far as to conclude that "Congress did not intend that the courts would make a true de novo review of classified documents, that is, a fresh determination of the legitimacy of each classified document."[27] It is also noteworthy that the only Exemption 1 FOIA decision to find agency "bad faith,"[28] which initially held that certain CIA procedural shortcomings amounted to "bad faith" on the part of the agency, was subsequently vacated on panel rehearing.[29]

Deference to Agency Expertise

While the standard of judicial review is often expressed in different ways,

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[24](...continued)
No. 83-1541, slip
op. at 7 (D.D.C. Mar. 9, 1984) (finding in camera review particularly appropriate when only small volume of documents involved and government makes proffer), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision); cf. Jones v. FBI, 41 F.3d 238, 242-44 (6th Cir. 1994) (finding in camera inspection necessary, not because FBI acted in bad faith with regard to plaintiff's FOIA request, but due to evidence of illegality with regard to FBI's underlying investigation); Wiener, 943 F.2d at 979 & n.9 (noting that in camera review by district court cannot "replace" requirement for sufficient Vaughn Index and can only "supplement" agency's justifications contained in affidavits).

[25] Armstrong v. Executive Office of the President, 97 F.3d 575, 580 (D.C. Cir. 1996).

[26] Id.

[27] Stein v. Department of Justice, 662 F.2d 1245, 1253 (7th Cir. 1981).

[28] McGehee v. CIA, 697 F.2d 1095, 1113 (D.C. Cir. 1983).

[29] McGehee v. CIA, 711 F.2d 1076, 1077 (D.C. Cir. 1983); see also Washington Post Co. v. DOD, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at *12 (D.D.C. Feb. 25, 1987) (deciding that addition of second classification category at time of litigation "does not create an inference of `bad faith' concerning the processing of plaintiff's request or otherwise implicating the affiant's credibility"); cf. Gilmore v. NSA, No. C92-3646, 1993 U.S. Dist. LEXIS 7694, at **28-30 (N.D. Cal. May 3, 1993) (holding that subsequent release by agency of some material initially withheld pursuant to Exemption 1 is not any indication of "bad faith").

courts have generally deferred to agency expertise in national security cases.[30] Accordingly, courts are usually reluctant to substitute their judgment in place of the agency's "unique insights" in the areas of national defense and foreign relations.[31] Courts have demonstrated this general deference to agency expertise by according little or no weight to opinions of persons other than the agency classification authority when reviewing the propriety of agency classification deter-

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[30] See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1993); Bowers v. United States Dep't of Justice, 930 F.2d 350, 357 (4th Cir. 1991); Doherty v. United States Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984); Taylor v. Department of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (holding that classification affidavits are entitled to "the utmost deference") (reversing district court disclosure order); Badalementi v. Department of State, 899 F. Supp. 542, 546 (D. Kan. 1995) (according substantial weight to agency's affidavit and granting motion for summary judgment in light of agency's expertise in national security matters); Canning v. United States Dep't of Justice, 848 F. Supp. 1037, 1042 (D.D.C. 1994) (describing how in according such deference, courts "credit agency expertise in evaluating matters of national security by focusing attention primarily on whether affidavits are sufficiently specific and by ensuring that they are not controverted by contradictory evidence or evidence of bad faith"). But see FOIA Update, Spring/Summer 1995, at 4, 12 (summarizing history of Exemption 1 disclosure orders and urging careful attention to classification determinations accordingly).

[31] See, e.g., Miller v. United States Dep't of State, 779 F.2d 1378, 1387 (8th Cir. 1985); see also Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) (stating that court "not in a position to `second-guess'" agency's determination regarding need for continued classification of material); Krikorian v. Department of State, 984 F.2d 461, 464-65 (D.C. Cir. 1993) (acknowledging agency's "unique insights" in areas of national defense and foreign relations); Braslavsky v. FBI, No. 92 C 3027, slip op. at 4-5 (N.D. Ill. June 6, 1994) (indicating that courts "generally inclined" to accept agency positions in area of intelligence sources and methods; "[a] court has neither the experience nor expertise to determine whether a classification [determination] is substantively correct"), aff'd, 57 F.3d 1073 (7th Cir. 1995) (unpublished table decision); Willens v. NSC, 726 F. Supp. 325, 326-27 (D.D.C. 1989) (declaring that court cannot second-guess agency's national security determinations when they are "credible and have a rational basis"). But see King v. United States Dep't of Justice, 830 F.2d 210, 226 (D.C. Cir. 1987) (holding that trial court erred in deferring to agency's judgment that information more than 35 years old remained classified when executive order presumed declassification of information over 20 years old and agency merely indicated procedural compliance with order); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 561 (S.D.N.Y. 1989) (asserting that such deference does not give agency "carte blanche" to withhold responsive documents without "valid and thorough affidavit"), subsequent decision, No. 87-Civ-1115, slip op. at 1-2 (S.D.N.Y. June 7, 1990) (upholding Exemption 1 excisions after in camera review of certain documents and classified CIA Vaughn affidavit).

minations.[32] Persons whose opinions have been rejected by the courts in this context include a former ambassador who had personally prepared some of the records at issue,[33] a retired admiral,[34] a former agent of the CIA,[35] and a retired CIA staff historian.[36]

In Camera Submissions

There are numerous instances in which courts have permitted agencies to submit explanatory in camera affidavits in order to protect certain national security information which could not be discussed in a public affidavit.[37] It is

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[32] See, e.g., Van Atta v. Defense Intelligence Agency, No. 87-1508, 1988 WL 73856, at *1-2 (D.D.C. July 6, 1988) (rejecting opinion of requester who claimed that willingness of foreign diplomat to discuss issue indicated no expectation of confidentiality); Washington Post Co. v. DOD, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at **19-20 (D.D.C. Feb. 25, 1987) (rejecting opinion of U.S. Senator who read document in official capacity as member of Committee on Foreign Relations); cf. Lawyers Alliance for Nuclear Arms Control v. Department of Energy, No. 88-CV-7635, 1991 WL 274860, at **1-2 (E.D. Pa. Dec. 17, 1991) (upholding Exemption 1 claim for Joint Verification Agreement records when requester provided no "admissible evidence" that officials of Soviet Union consented to release of requested nuclear test results); Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 315 (D.C. Cir. 1988) (emphasizing no "special deference to agency beyond Exemption 1 context"). But cf. Washington Post v. DOD, 766 F. Supp. 1, 13-14 (D.D.C. 1991) (adjudging that "non-official releases" contained in books by participants involved in Iranian hostage rescue attempt--including ground assault commander and former President Carter--have "good deal of reliability" and require government to explain "how official disclosure" of code names "at this time would damage national security").

[33] See Rush v. Department of State, No. 88-8245, slip op. at 17-18 (S.D. Fla. Sept. 12, 1990) (magistrate's recommendation), adopted, 740 F. Supp. 1548, 1554 (S.D. Fla. 1990); cf. Goldberg v. United States Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987) (accepting classification officer's determination even though more than 100 ambassadors did not initially classify information).

[34] See Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989).

[35] See Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982).

[36] See Pfeiffer v. CIA, 721 F. Supp. 337, 340-41 (D.D.C. 1989).

[37] See, e.g., Patterson v. FBI, 893 F.2d 595, 599-600 (3d Cir. 1990); Simmons v. United States Dep't of Justice, 796 F.2d 709, 711 (4th Cir. 1986); Ingle v. Department of Justice, 698 F.2d 259, 264 (6th Cir. 1983) (ruling that in camera review should be secondary to testimony or affidavits); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); Stein v. Department of Justice, 662 F.2d 1245, 1255-56 (7th Cir. 1981); Greyshock v. United States Coast Guard, No. 94-00563, slip op. at 1 (D. Haw. May 9, 1995) (finding upon in camera ex-

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entirely clear, though, that agencies taking such a special step are under a duty to "create as complete a public record as is possible" before doing so.[38]

In this regard, it is reasonably well settled that counsel for plaintiffs are not entitled to participate in such in camera proceedings.[39] Several years ago, though,

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[37](...continued)
amination of agency's classified declaration records at issue properly withheld), aff'd, 107 F.3d 16 (9th Cir. 1997) (unpublished table decision); cf. Armstrong v. Executive Office of the President, 97 F.3d 575, 580-81 (D.C. Cir. 1996) (finding that although district court may have erred by not explaining reasons for using in camera affidavit, any such error was "harmless" because agency adequately explained why it could not release withheld information).

[38] Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976); see also Armstrong, 97 F.3d at 580 (holding that when district court uses an in camera affidavit, even in national security cases, "it must both make its reasons for doing so clear and make as much as possible of the in camera submission available to the opposing party" (citing Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1465 (D.C. Cir. 1984)); Patterson, 893 F.2d at 600; Simmons, 796 F.2d at 710; Scott v. CIA, 916 F. Supp. 42, 48-49 (D.D.C. 1996) (denying request for in camera review until agency "creates as full a public record as possible"); Public Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995) (ordering in camera review only after agency created "as full a public record as possible" (citing Hayden v. NSA, 608 F.2d 1381, 1384 (D.C. Cir. 1979)); National Sec. Archive v. Office of Indep. Counsel, No. 89-2308, 1992 U.S. Dist. LEXIS 13146, at **6-7 (D.D.C. Aug. 28, 1992) (applying Phillippi standards, refusing to review in camera affidavits until agency "has stated publicly `in as much detail as possible' . . . reasons for non-disclosure"); Moessmer v. CIA, No. 86-948, slip op. at 9-11 (E.D. Mo. Feb. 17, 1987) (finding in camera review appropriate when record contains contradictory evidence), aff'd, 871 F.2d 1092 (6th Cir. 1988) (unpublished table decision). But see Public Citizen v. Department of State, No. 91-746, 1991 WL 179116, at *3 (D.D.C. Aug. 26, 1991) (ordering in camera review of records upon basis that public testimony of ambassador may have "waived" Exemption 1 protection), aff'd, 11 F.3d 198 (D.C. Cir. 1993).

[39] See Salisbury, 690 F.2d at 973 n.3; Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982); Hayden, 608 F.2d at 1385-86; Martin v. United States Dep't of Justice, No. 83-2674, slip op. at 1 (W.D. Pa. June 5, 1986) (requiring agency to release unclassified portions of transcript of in camera testimony), aff'd, 800 F.2d 1135 (3d Cir. 1986) (unpublished table decision); see also Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) (holding that plaintiff's counsel not permitted to participate in in camera review of documents arguably covered by state secrets privilege); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (finding no reversible error where court not only reviewed affidavit and documents in camera, but also received authenticating testimony ex parte); cf. Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1470-71 & n.2 (D.C. Cir. 1983) (denying participation by plaintiff's counsel even when information withheld was personal privacy information). But cf. Lederle Lab. v. HHS, No. 88-249, slip op. at 2-3
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one court took the unprecedented step of appointing a special master to review and categorize a large volume of classified records.[40] In other instances involving large numbers of records, courts have on occasion ordered agencies to submit samples of the documents at issue for in camera review.[41]

In a decision which highlights some of the difficulties of Exemption 1 litigation practice, the Court of Appeals for the Fourth Circuit issued a writ of mandamus which required that court personnel who would have access to classified materials submitted in camera in an Exemption 1 case obtain security clearances prior to the submission of any such materials to the court.[42] On remand, the district court judge reviewed the disputed documents entirely on his own.[43] Consistent with the special precautions taken by courts in Exemption 1 cases, the government also has been ordered to provide a court reporter with the requisite security clearances to transcribe in camera proceedings, in order "to establish a complete record for meaningful appellate review."[44]

Agencies have in other cases been compelled to submit in camera affidavits when disclosure in a public affidavit would vitiate the very protection afforded by

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[39](...continued)
(D.D.C. May 2, 1988) (granting restrictive protective order in Exemption 4 case permitting counsel for requester to review contested business information).

[40] See Washington Post Co. v. DOD, No. 84-3400, slip op. at 2 (D.D.C. Jan. 15, 1988), petition for mandamus denied sub nom. In re DOD, 848 F.2d 232 (D.C. Cir. 1988); cf. Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1301 (N.D. Cal. 1992) (holding that court "will not hesitate" to appoint special master to assist with in camera review of documents if agency fails to submit adequate Vaughn affidavits).

[41] See, e.g., Wilson v. CIA, No. 89-3356, 1991 WL 226682, at *3 (D.D.C. Oct. 15, 1991) (ordering in camera submission of "sample" of 50 documents because "neither necessary nor practicable" for court to review all 1000 processed records).

[42] In re United States Dep't of Justice, No. 87-1205, slip op. at 4-5 (4th Cir. Apr. 7, 1988).

[43] See Bowers v. United States Dep't of Justice, No. C-C-86-336, 1990 WL 41893, at *1 (W.D.N.C. Mar. 9, 1990), rev'd on other grounds, 930 F.2d 350 (4th Cir. 1991).

[44] Willens v. NSC, 720 F. Supp. 15, 16 (D.D.C. 1989); cf. Physicians for Soc. Responsibility, Inc. v. United States Dep't of Justice, No. 85-169, slip op. at 3-4 (D.D.C. Aug. 25, 1985) (transcript of in camera proceedings--from which plaintiff's counsel excluded--placed under seal). But cf. Pollard, 705 F.2d at 1154 (finding no reversible error when no transcript made of ex parte testimony of FBI agent who merely "authenticated and described" documents at issue).

Exemption 1.[45] Such a procedure is sometimes employed when even the confirmation or denial of the existence of records at issue would pose a threat to national security--the so-called "Glomar" response.[46] (For a further discussion of

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[45] See, e.g., Green v. United States Dep't of State, No. 85-0504, slip op. at 17-18 (D.D.C. Apr. 17, 1990) (determining that public Vaughn affidavit containing additional information could "well have the effect of prematurely letting the cat out of the bag"); cf. Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993) (reasoning that "a more detailed affidavit could have revealed the very intelligence sources and methods the CIA wished to keep secret"); Gilmore v. NSA, No. C92-3646, 1993 U.S. Dist. LEXIS 7694, at **18-19 (N.D. Cal. May 3, 1993) (ruling that agency has provided as much information as possible in public affidavit without "thwarting" purpose of Exemption 1 (citing King v. United States Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987))); Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 4 (D.D.C. Mar. 2, 1993) (stating that "[i]n the national security context, the release of detailed information through discovery may render the FOIA exemption meaningless and compromise intelligence sources and methods"); Krikorian v. Department of State, No. 88-3419, 1990 WL 236108, at *3 (D.D.C. Dec. 19, 1990) (declaring agency's public affidavits sufficient because requiring more detailed descriptions of information would give foreign governments and confidential intelligence sources "reason to pause" before offering advice or useful information to agency officials in future), aff'd in pertinent part, 984 F.2d 461, 464-65 (D.C. Cir. 1993).

[46] See Phillippi, 546 F.2d at 1013 (regarding request for documents pertaining to Glomar Explorer submarine-retrieval ship; consequently, "neither confirm nor deny" response now known as "Glomar" response or "Glomarization"); see, e.g., Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) (applying response to request for any record reflecting any attempt by western countries to overthrow Albanian government); Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (applying response to request for any record revealing any covert CIA connection with University of California); Earth Pledge Found. v. CIA, No. 95-0257, 1996 WL 694427, at **4-5 (S.D.N.Y. Dec. 4, 1996) (ruling that agency properly refused to confirm or deny existence of correspondence between CIA headquarters and alleged CIA station in Dominican Republic, because fact of station's existence itself was classified and disclosure would reveal agency's intelligence methods and could cause damage to U.S. foreign relations); Nayed v. INS, No. 91-805, 1993 WL 524541, at *2 (D.D.C. Nov. 29, 1993) (finding "Glomar" response appropriate for request for records on former Libyan national denied entry into United States because "confirmation that information exists would . . . be admission of identity of CIA intelligence interest . . . [while] denial . . . would allow interested parties to ascertain [such] interests based on their analysis of patterns of CIA answers in different FOIA cases"); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 53-54 (D.D.C. 1985) (applying "Glomar" response to request for any record which would reveal whether requester was target of surveillance pursuant to Foreign Intelligence Surveillance Act); see also Exec. Order No. 12,958,
§ 3.7(a), 3 C.F.R. 333, 347 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and in FOIA Update, Spring/Summer 1995, at 9; Attorney General's

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in camera review, see Litigation Considerations, In Camera Inspection, below.)

Rejection of Classification Claims

Prior to 1986, no appellate court had ever upheld, on the substantive merits of the case, a decision to reject an agency's classification claim. In 1980, the Court of Appeals for the District of Columbia Circuit let stand, but on entirely procedural grounds, a district court determination that the CIA's affidavits were general and conclusory and that its Exemption 1 claims had to be rejected as "overly broad."[47] Moreover, that portion of the D.C. Circuit's decision was subsequently vacated by the Supreme Court.[48] Several years later, in an unprecedented and exceptionally complex case, a district court ordered the disclosure of classified records belatedly determined by it to be within the scope of the request and therefore not addressed in the agency's classification affidavits.[49] The government never had the opportunity to obtain appellate review of the merits of this adverse decision because the records were disclosed after stays pending appeal were denied, successively, by the district court, the Court of Appeals for the Ninth Circuit, and even by the Supreme Court.[50] In addition, the district court ordered the disclosure of certain other segments of classified information because it was "convinced [that] disclosure of this information poses no threat to national

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[46](...continued)
Memorandum on the 1986 Amendments to the Freedom of Information Act 26 (Dec. 1987); FOIA Update, Spring 1983, at 5; cf. Minier v. CIA, 88 F.3d 796, 801-02 (9th Cir. 1996) (finding "neither confirm nor deny" response proper for request seeking records on individual's employment relationship with CIA because to reveal such information would "provide a window into the [agency's] `sources and methods'") (Exemption 3); Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (holding "Glomar" response proper for request for records on murdered Iranian national) (Exemption 3); Levy v. CIA, No. 95-1276, slip op. at 11-14 (D.D.C. Nov. 16, 1995) (finding "Glomar" response appropriate regarding request for CIA records on foreign national because "[c]onsistent treatment of all requests relating to foreign nationals is a critical element to the CIA's protective strategy to safeguard its intelligence sources and methods") (Exemption 3), summary affirmance granted, No. 96-5004 (D.C. Cir. Jan. 15, 1997).

[47] Holy Spirit Ass'n v. CIA, 636 F.2d 838, 845 (D.C. Cir. 1980); see also FOIA Update, Spring/Summer 1995, at 4, 12 (providing summary of FOIA cases involving Exemption 1 disclosure orders).

[48] CIA v. Holy Spirit Ass'n, 455 U.S. 997 (1982); see also FOIA Update, March 1982, at 5.

[49] Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 16 (N.D. Cal. Mar. 27, 1985); see also Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1517-18, 1530-31 (N.D. Cal. 1984).

[50] Powell, No. C-82-326, slip op. at 4-6 (N.D. Cal. June 14, 1985), stay denied, No. 85-1918 (9th Cir. July 18, 1985), stay denied, No. A-84 (U.S. July 31, 1985) (Rehnquist, Circuit Justice) (undocketed order).

security."[51] The district court did, however, grant a stay of this aspect of its disclosure order so the government could take an appeal.[52] Ultimately, the case was settled with the government being permitted to withhold this classified information.

In 1986, the Court of Appeals for the Second Circuit upheld a district court disclosure order in a case in which the district court found that the affidavit submitted by the FBI inadequately described the withheld documents and was unconvincing as to any potential harm which would result from disclosure.[53] This finding, coupled with in camera inspection of the documents by the district court, led the court of appeals to conclude that "it would be inappropriate . . . to give more deference to the FBI's characterization of the information than did the trial court."[54] The case was subsequently settled, however, and the plaintiff withdrew his request for the classified records ordered disclosed in exchange for the government's agreement not to seek to vacate the Second Circuit's opinion in the Supreme Court. The precedential value of the Second Circuit's decision is therefore questionable in light of the extraordinary procedural and factual nature of the case.

Also of note in this regard is a district court decision in which it required in camera affidavits on all records, most of which were classified, "not because the agencies' good faith had been controverted, but `in order that the Court may be able to monitor the agencies' determinations'"; ultimately, the district court did order some classified information disclosed.[55] However, the D.C. Circuit, on appeal, remanded the case for submission of briefs in light of the Supreme Court's decision in CIA v. Sims.[56] On remand, the district court found most of the information to be protected under Sims, but it affirmed its disclosure order with regard to some of the information that the CIA had sought to protect under Exemptions 1 and 3.[57] The D.C. Circuit subsequently reversed that part of the district court's order on remand that still required disclosure of certain CIA

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[51] Powell, No. C-82-326, slip op. at 8 (N.D. Cal. Mar. 27, 1985).

[52] Powell, No. C-82-326, slip op. at 6 (N.D. Cal. June 14, 1985).

[53] Donovan v. FBI, 806 F.2d 55 (2d Cir. 1986); see also Donovan v. FBI, 625 F. Supp. 808, 811 (S.D.N.Y. 1986).

[54] 806 F.2d at 60.

[55] Fitzgibbon v. CIA, 578 F. Supp. 704, 709 (D.D.C. 1983), motion for reconsideration granted in part, No. 79-956 (D.D.C. July 5, 1984).

[56] 471 U.S. 159 (1985); see Fitzgibbon v. CIA, No. 84-5632 (D.C. Cir. Mar. 13, 1986).

[57] Fitzgibbon v. CIA, No. 79-956, slip op. at 14-15, 17-18 (D.D.C. May 19, 1989).

information, though it rested its decision upon Exemption 3 grounds alone.[58] It concluded that "whatever merits" there may have been to support disclosure of the information at issue in the case had been "vaporized by the unequivocal sweep of the Supreme Court's decision in Sims."[59]

Two significant D.C. Circuit decisions, each of which reversed a district court disclosure order, strongly reaffirmed the deference that is due an agency's classification judgment. In the first, the D.C. Circuit overturned a lower court conclusion that the existence of information in the public domain similar to the information at issue warranted the disclosure of that classified information.[60] Emphasizing that the least "bit" of classified information deserves protection, it observed that the "district court's finding . . . reveals a basic misunderstanding of the information withheld," and that the "district court did not give the required `substantial weight' to the [agency's] uncontradicted affidavits."[61]

Similarly, in the second case, the D.C. Circuit vacated a district court determination that public statements by senior executive and legislative branch officials constituted sufficient official acknowledgment of "covert action" by the government against Nicaragua to warrant release of the sensitive documents at issue, specifically chastised the lower court for "refusing to consider in camera the confidential declaration and confidential memorandum of law offered by the government," and remanded the case for a more careful consideration of the government's classification judgment.[62] On remand, the district court found that the "Government's general acknowledgment of covert activities . . . is insufficient to require release" of its records.[63]

In 1995, the Court of Appeals for the Ninth Circuit affirmed a district court

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[58] Fitzgibbon v. CIA, 911 F.2d 755, 757, 760, 764 (D.C. Cir. 1990).

[59] Id. at 760; see also Siminoski v. FBI, No. 83-6499, slip op. at 14-18 (C.D. Cal. Jan. 16, 1990) (rejecting magistrate's recommendation to disclose classified information).

[60] Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985).

[61] Id. at 607 & n.3; see also Bowers v. United States Dep't of Justice, 930 F.2d 350, 352, 354-55 (4th Cir. 1991) (reversing district court order to disclose classified information because lower court was "clearly erroneous" in not applying proper standards in review of records and in not giving any weight to detailed explanations of FBI as to why undisclosed information in its counterintelligence files should be withheld).

[62] Peterzell v. Department of State, No. 84-5805, slip op. at 2 (D.C. Cir. Apr. 2, 1985).

[63] Peterzell v. Department of State, No. 82-2853, slip op. at 3 (D.D.C. Sept. 20, 1985).

disclosure order of classified information.[64] In that case, involving a request to the FBI for records of its investigations into individuals and organizations associated with the Free Speech Movement at the University of California at Berkeley during the 1960's, the full Supreme Court previously had taken the extraordinary step of staying the district court's disclosure order pending a full review of the decision by the court of appeals.[65] In its ruling, the district court ignored the recommendation of a magistrate who had concluded that the information was properly classified by the FBI, and grounded its decision on its supposition that the information involved was "likely to have been public knowledge."[66]

Undertaking minimal appellate review, the Ninth Circuit held that the district court had "correctly concluded that the government did not carry its burden" as to the classified information contained in three documents because it had not demonstrated with sufficient "particularity" why classification was warranted.[67] It flatly rejected the FBI's argument that the lower court had failed to afford the government's classification determinations "substantial deference," summarily declaring that "[t]his contention does not persuade us [because] the FBI had failed to make an initial showing which would justify [such] deference."[68]

At the same time, the Ninth Circuit affirmed the district court's determination that a fourth document could be disclosed in part while "still accommodating the government's classification interest."[69] The district court had allowed the FBI to delete information identifying an informant, but ruled that the document as excised could be released to the requester.[70] In that instance, the Ninth Circuit held that the FBI had carried its burden with regard to the deleted portions of the document and permitted the agency to withhold them.[71]

In the first case applying Executive Order 12,958,[72] a district court ini

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[64] Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 807-08 (9th Cir. 1995), petition for cert. dismissed, 116 S. Ct. 833 (1996); see also FOIA Update, Spring/Summer 1995, at 13.

[65] Rosenfeld v. United States Dep't of Justice, 761 F. Supp. 1440, 1451 (N.D. Cal. 1991), emergency stay denied on juris. grounds, No. 91-15854 (9th Cir. June 12, 1991), stay pending appeal granted, 501 U.S. 1227 (1991); see also FOIA Update, Summer 1991, at 1-2.

[66] 761 F. Supp. at 1451.

[67] 57 F.3d at 807.

[68] Id.

[69] Id. at 808.

[70] Id. at 807.

[71] Id. at 807-08.

[72] 3 C.F.R. 333 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and (continued...)

tially ordered the disclosure of a letter sent by the British Home Office to the Department of Justice which was not classified until after receipt of the FOIA request.[73] The court first rejected the government's argument that the letter was properly classified as "foreign government information" because the court found that the agency's affidavit failed to demonstrate a "contemporaneous expectation of confidentiality."[74] Furthermore, the court found that there was no showing by the government of a presumption of confidentiality under the prior executive order.[75] For purposes of its analysis, the court assumed that disclosure of the letter could "damage relations" between the United States and Great Britain.[76] Nonetheless, the court determined that the government's affidavit was too "general" and "conclusory in nature" to permit the court to find that the letter was properly withheld pursuant to Exemption 1.[77]

On a motion for reconsideration, the court rejected the government's arguments that: (1) the court had failed to give the agency's determination of harm sufficient deference;[78] (2) the information constituted "foreign government information";[79] and (3) Executive Order 12,356 should have applied to the case because the letter was originated prior to the effective date of Executive Order 12,958.[80] With regard to the last argument, the court conceded that the prior order--which provided for a presumption of harm concerning the disclosure of "foreign government information"--would have applied "[h]ad the classification

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[72](...continued)
reprinted in abridged form in FOIA Update, Spring/Summer 1995, at 5-10; see also Voinche v. FBI, 940 F. Supp 323, 327-28 (D.D.C. 1996) (finding that agency properly applied Exec. Order No. 12,958 to withhold records), aff'd per curiam, No. 96-5304, 1997 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997), petition for cert. filed, 66 U.S.L.W. 3178 (U.S. Sept. 2, 1997) (No. 97-383); Judicial Watch v. United States Dep't of Commerce, No. 95-0133, slip op. at 34 (D.D.C. Sept. 6, 1996) (same).

[73] Weatherhead v. United States, No. 95-519, slip op. at 5-6 (E.D. Wash. Mar. 29, 1996), reconsideration granted in pertinent part (E.D. Wash. Sept. 9, 1996) (appeal pending).

[74] Id. at 5-7; see also Exec. Order No. 12,958, § 1.1(d) (definition of "foreign government information").

[75] Weatherhead, No. 95-519, slip op. at 5-6 (E.D. Wash. Mar. 29, 1996).

[76] Id. at 7, 12.

[77] Id. at 10-11.

[78] Weatherhead, No. 95-519, slip op. at 3-4 (E.D. Wash. Sept. 9, 1996).

[79] Id. at 4-6.

[80] Id. at 6-7.

decision been made with reasonable dispatch."[81] After first rejecting the government's alternative motion that it undertake in camera inspection of the letter, the court "reluctantly" agreed to do so because "of the danger that highly sensitive . . . material might be released only because [the agency was] unable to articulate a factual basis for their concerns without giving away the information itself."[82] When this proved to be the case upon the court's in camera review of the document, the court granted the motion for reconsideration and upheld the letter's classification.[83]

"Public Domain" Information

Several courts also have had occasion to consider whether agencies have a duty to disclose classified information which has purportedly found its way into the public domain. In this regard, it has been held that, in asserting a claim of prior public disclosure, a FOIA plaintiff bears "the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld."[84] Accordingly, Exemption 1 claims should not be under

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[81] Id. at 7.

[82] Id. at 7-8.

[83] Id. at 8. But see Springmann v. United States Dep't of State, No. 93-1238, slip op. at 9-11 (D.D.C. Apr. 21, 1997) (ruling that disclosure of two paragraphs in embassy report about American employee engaging in religiously offensive behavior in Saudi Arabia would not harm national security), renewed motion for summary judgment denied without issuance of final judgment (D.D.C. Aug. 6, 1997); Keenan v. Department of Justice, No. 94-1909, slip op. at 8-11 (D.D.C. Mar. 24, 1997) (finding insufficient coded Vaughn Index which merely recites executive order's language) (renewed motion for summary judgment pending).

[84] Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); see Scott v. CIA, 916 F. Supp. 42, 50 (D.D.C. 1996) (ordering plaintiff to compile list of information allegedly in public domain "with specific documentation demonstrating the legitimacy of such claims" and requiring release of that information if actually in public domain unless government demonstrates its release "threatens the national security"); Pfeiffer v. CIA, 721 F. Supp. 337, 342 (D.D.C. 1989) (holding that plaintiff must do more than simply identify "information that happens to find its way into a published account" to meet this burden); cf. Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (stating that "party who asserts . . . material publicly available carries the burden of production on that issue . . . because the task of proving the negative--that the information has not been revealed--might require the government to undertake an exhaustive, potentially limitless search") (Exemptions 3, 7(C), and 7(D)); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (holding that "[i]t is far more efficient, and . . . fairer, to place the burden of production on the party who claims that the information is publicly available") (reverse FOIA suit). But see Washington Post v. DOD, 766 F. Supp. 1, 12-13 (D.D.C. 1991) (ruling that agency has ultimate burden of proof when comparing

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mined by generalized allegations that classified information has been leaked to the press or otherwise made available to members of the public.[85] Courts have carefully recognized the distinction between a bona fide declassification action or official release and unsubstantiated speculation lacking official confirmation, holding that classified information is not considered to be in the public domain unless it has been the subject of an official disclosure.[86]

One issue that has arisen in this context is whether public statements by former government officials constitute such an "official disclosure," and thus

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[84](...continued)
publicly disclosed information with information being withheld, determining whether information is identical and, if not, determining whether release of slightly different information would harm national security).

[85] See Exec. Order No. 12,958, § 1.2(c), 3 C.F.R. 333, 335 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and in FOIA Update, Spring/ Summer 1995, at 5 (stating that "[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information"); see also Public Citizen v. Department of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (holding that "an agency official does not waive FOIA exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure under that exemption").

[86] See, e.g., Hoch v. CIA, No. 88-5422, 1990 WL 102740, at *1 (D.C. Cir. July 20, 1990) (concluding that without official confirmation, "clear precedent establishes that courts will not compel [an agency] to disclose information even though it has been the subject of media reports and speculation"); see also Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (ruling that there had been no "widespread dissemination" of information in question); Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985) (reasoning that even if withheld data was same as estimate in public domain, not same as knowing NRC's official policy as to "proper level of threat a nuclear facility should guard against"); Afshar v. Department of State, 702 F.2d at 1130-31 (observing that foreign government can ignore "[u]nofficial leaks and public surmise . . . but official acknowledgment may force a government to retaliate"); Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 802 (D.D.C. 1992) (recognizing that "[p]assage of time, media reports and informed or uninformed speculation based on statements by participants cannot be used . . . to undermine [government's] legitimate interest in protecting international security [information]"), aff'd in pertinent part, 23 F.3d 548, 553 (D.C. Cir. 1994); Van Atta v. Defense Intelligence Agency, No. 87-1508, 1988 WL 73856, at **2-3 (D.D.C. July 6, 1988) (holding that disclosure of information to foreign government during diplomatic negotiations not "public disclosure"); cf. Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (fact that some information about subject of request may have been made public by other governmental agencies found not to defeat agency's "Glomar" response in Exemption 3 context). But see Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (ruling that Exemption 1 protection is not available when same documents were disclosed by foreign government or when same information was disclosed to press in "off-the-record exchanges").

prevent an agency from invoking Exemption 1 to withhold information that it determines still warrants national security protection. In this regard, the Court of Appeals for the Second Circuit has rejected the argument that a retired admiral's statements constituted an authoritative disclosure by the government.[87] It pointedly stated: "Officials no longer serving with an executive branch department cannot continue to disclose official agency policy, and certainly they cannot establish what is agency policy through speculation, no matter how reasonable it may appear to be."[88] Additionally, the Second Circuit affirmed the decision of the district court in holding that the congressional testimony of high-ranking Navy officials did not constitute official disclosure because it did not concern the specific information being sought.[89]

Similarly, courts have rejected the view that widespread reports in the media about the general subject matter involved are sufficient to overcome an agency's Exemption 1 claim for related records. Indeed, in one case, the court went so far as to hold that 180,000 pages of CIA records pertaining to Guatemala were properly classified despite the fact that the public domain contained significant information and speculation about CIA involvement in the 1954 coup in Guatemala: "CIA clearance of books and articles, books written by former CIA officials, and general discussions in Congressional publications do not constitute official disclosures."[90] In a subsequent case, one court went even further and held that documents were properly classified even though disclosed "involuntarily as a result of [a] tragic accident such as an aborted rescue mission [in Iran], or used in evidence to prosecute espionage."[91]

In a 1990 decision, the Court of Appeals for the District of Columbia Circuit held that for information to be "officially acknowledged" in the context of Exemption 1, it must: (1) be as "specific" as the information previously released; (2) "match" the information previously disclosed; and (3) have been made public through an "official and documented" disclosure.[92] Applying these criteria, the

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[87] See Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989).

[88] Id. at 422.

[89] Id. at 421.

[90] Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984); see Pfeiffer v. CIA, 721 F. Supp. at 342; see also Washington Post, 766 F. Supp. at 11-12 (finding no "presumption of reliability" for facts contained in books subject to prepublication review by government agency); cf. McGehee v. Casey, 718 F.2d 1137, 1141 & n.9 (D.C. Cir. 1983) (determining that CIA cannot reasonably bear burden of conducting exhaustive search to prove that particular items of classified information have never been published) (non-FOIA case).

[91] Washington Post Co. v. DOD, No. 84-3400, slip op. at 3 (D.D.C. Sept. 22, 1986).

[92] Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990); see also Afshar, 702 (continued...)

D.C. Circuit reversed the lower court's disclosure order and held that information published in a congressional report did not constitute "official acknowledgment" of the purported location of a CIA station, because the information sought related to an earlier time period than that discussed in the report.[93] In so ruling, it did not address the broader question of whether congressional release of the identical information relating to intelligence sources and methods could ever constitute "official acknowledgment," thus requiring disclosure under the FOIA.[94] However, the D.C. Circuit had previously considered this broader question and had concluded that congressional publications do not constitute "official acknowledgment" for purposes of the FOIA.[95]

In 1993, the D.C. Circuit again had an opportunity to consider the issue of whether an agency had "waived" its ability to properly withhold records pursuant to Exemption 1. The case, Public Citizen v. Department of State,[96] involved the question of whether the public congressional testimony of the U.S. Ambassador to Iraq constituted such a "waiver" so as to prevent the agency from invoking the FOIA's national security exemption to withhold related records.[97] The district court had held--after reviewing the seven documents at issue in camera--that the public testimony had not "waived" Exemption 1 protection because the "context" of the information in the documents was sufficiently "different" so as to not "negate" their "confidentiality."[98] Terming this an "unusual FOIA case" because the requester did not challenge the district court's conclusion that the documents were properly exempt from disclosure under Exemption 1 and because the requester also conceded that it could not meet the strict test for "waiver," the D.C. Circuit rejected the requester's primary argument that the facts of this case distin-

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[92](...continued)
F.2d at 1130, 1133-34. But see Krikorian v. Department of State, 984 F.2d 461, 467-68 (D.C. Cir. 1993) (remanding to district court to determine whether information excised in one document "officially acknowledged" by comparing publicly available record with record withheld; leaving to district court's discretion whether this could be better accomplished by supplemental agency affidavit or by in camera inspection).

[93] 911 F.2d at 765-66.

[94] Id.

[95] See, e.g., Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that inclusion of information in Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project v. Casey, 656 F.2d 724, 744 (D.C. Cir. 1981) (finding that publication of Senate report does not constitute official release of agency information); see also Earth Pledge Found. v. CIA, No. 95-0257, 1996 WL 694427, at *5 (S.D.N.Y. Dec. 4, 1996) (same).

[96] 11 F.3d at 199.

[97] Id.

[98] Public Citizen v. Department of State, 787 F. Supp. 12, 13, 15 (D.D.C. 1992).

guished it from the court's prior decisions on this question.[99]

The requester in Public Citizen contended first that the court's prior decisions concerned attempts by FOIA requesters to compel agencies to confirm or deny the truth of information that others had already publicly disclosed.[100] The plaintiff then argued that the Ambassador's public statements about her meeting with the Iraqi leader prior to the invasion of Kuwait were far more detailed than those that the D.C. Circuit had found to be inadequate to find "waiver" in previous cases.[101] The D.C. Circuit repudiated both of the requester's points and, in affirming the district court's decision, grounded its own decision in the fact that the requester "conceded" it could not "meet [the] requirement that it show that [the Ambassador's] testimony was `as specific as' the documents it [sought] in this case, or that her testimony `matche[d]' the information contained in the documents."[102] Acknowledging that such a stringent standard is a "high hurdle for a FOIA plaintiff to clear," the D.C. Circuit concluded that the government's "vital interest in information relating to the national security and foreign affairs dictates that it must be."[103] To hold otherwise in a situation where the government had affirmatively disclosed some information about a classified matter would, in the court's view, give the agency "a strong disincentive ever to provide the citizenry with briefings of any kind on sensitive topics."[104] (For a further discussion of this issue, see Discretionary Disclosure and Waiver, below.)

A final, seemingly obvious point--but one still not accepted by all FOIA requesters--is that classified information will not be released under the FOIA even to a requester of "unquestioned loyalty."[105] In a case decided in 1990, a government employee with a current "Top Secret" security clearance was denied access to classified records pertaining to himself because Exemption 1 protects "information from disclosure based on the nature of the material, not on the nature of the individual requester."[106]

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[99] 11 F.3d at 201.

[100] Id. at 201-03.

[101] Id. at 203.

[102] Id.

[103] Id.

[104] Id.

[105] Levine v. Department of Justice, No. 83-1685, slip op. at 6 (D.D.C. Mar. 30, 1984) (concluding that regardless of requester's loyalty, release of documents to him could "open the door to secondary disclosure to others").

[106] Martens v. United States Dep't of Commerce, No. 88-3334, 1990 U.S. Dist. LEXIS 10351, at *10 (D.D.C. Aug. 6, 1990) (Privacy Act case); see also Miller v. Casey, 730 F.2d 773, 778 (D.C. Cir. 1984) (determining that agency decision to deny historical research access is not reviewable by courts); cf. United States

(continued...)

EXEMPTION 1

Executive Order 12,958

As with prior executive orders, Executive Order 12,958 recognizes both the right of the public to be informed about activities of its government and the need to protect national security information from unauthorized or untimely disclosure.[107] Accordingly, information may not be classified unless "its disclosure reasonably could be expected to cause damage to the national security."[108] Courts grappling with the degree of certainty necessary to demonstrate the contemplated damage under this standard have recognized that an agency's articulation of the threatened harm must always be speculative to some extent and that to require an actual showing of harm would be judicial "overstepping."[109] In the area of intelligence sources and methods, courts are strongly inclined to accept the agency's position that disclosure of this type of information will cause damage to national security interests because this is "necessarily a region for forecasts in which [the agency's] informed judgment as to potential future harm should be respected."[110]

This standard is elaborated upon in Section 1.5 of the order, which specifies the types of information that may be considered for classification. The information categories identified as bases for classification in Executive Order 12,958 closely parallel those identified in Executive Order 12,356 and include:

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[106](...continued)
Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) (stating that "the identity of the requester has no bearing on the merits of his or her FOIA request") (Exemption 7(C)); FOIA Update, Spring 1989, at 5 (advising that, as general rule, all FOIA requesters should be treated alike).

[107] Exec. Order No. 12,958, 3 C.F.R. 333 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and reprinted in abridged form in FOIA Update, Spring/Summer 1995, at 5-10.

[108] Exec. Order No. 12,958, § 1.2(a)(4); see also Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (establishing "foreseeable harm" standard governing use of FOIA exemptions); FOIA Update, Spring 1994, at 3 (recognizing harm standard built into Exemption 1).

[109] Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980); cf. Snepp v. United States, 444 U.S. 507, 513 n.8 (1980) (articulating that "[t]he problem is to ensure, in advance, and by proper [CIA prepublication review] procedures, that information detrimental to the national interest is not published") (non-FOIA case).

[110] Gardels v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982); see also Washington Post v. DOD, 766 F. Supp. 1, 7 (D.D.C. 1991) (observing that disclosure of working files of failed Iranian hostage rescue attempt containing intelligence planning documents would "serve as a model of `do's and don't's'" for future counterterrorist missions "with similar objectives and obstacles").

foreign government information;[111] vulnerabilities or capabilities of systems, installations, projects, or plans relating to national security;[112] intelligence activities, sources or methods,[113] or cryptology;[114] foreign relations or foreign activities,

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[111] See, e.g., Krikorian v. Department of State, 984 F.2d 461, 465 (D.C. Cir. 1993) (finding that telegram reporting discussion between agency official and high-ranking foreign diplomat regarding terrorism properly withheld as foreign government information; release would "jeopardize `reciprocal confidentiality'" between governments) (decided under Exec. Order No. 12,356); Ajluni v. FBI, No. 94-325, slip op. at 9 (N.D.N.Y. July 13, 1996) (rejecting plaintiff's assertion that to qualify as foreign government information agency "should be forced to identify at least which government supplied the information," because to do so would cause such sources of information "to dry up") (decided under Exec. Order No. 12,356); Badalementi v. Department of State, 899 F. Supp. 542, 546-47 (D. Kan. 1995) (categorizing record reflecting negotiations among United States, Spain, and Italy regarding extradition of alleged drug smuggler as foreign government information) (decided under Exec. Order No. 12,356). But see Weatherhead v. United States, No. 95-519, slip op. at 5-6 (E.D. Wash. Mar. 29, 1996) (mistakenly concluding that letter sent by British Home Office to Department of Justice does not contain "foreign government information" because record fails to show "contemporaneous expectation of confidentiality") (decided under Exec. Order No. 12,958), reconsideration granted on other grounds, slip op. at 8 (E.D. Wash. Sept. 9, 1996) (appeal pending).

[112] See, e.g., Public Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 21 (D.D.C. 1995) (identifying videotapes made during raid by U.S. forces in Somalia as relating to vulnerabilities or capabilities of projects concerning national security) (decided under Exec. Order No. 12,356); Gottesdiener v. Secret Serv., No. 86-576, slip op. at 5 (D.D.C. Feb. 21, 1989) (decided under Exec. Order No. 12,356); cf. U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 9 (D.D.C. Mar. 26, 1986) (providing protection for information regarding armored limousines for the President) (Exemptions 1 and 7(E)) (decided under Exec. Order No. 12,356).

[113] See, e.g., Jones v. FBI, 41 F.3d 238, 244 (6th Cir. 1994) (protecting "numerical designators" assigned to national security sources) (decided under Exec. Order No. 12,356); Patterson v. FBI, 893 F.2d 595, 597, 601 (3d Cir. 1990) (protecting information pertaining to intelligence sources and methods used by FBI in investigation of student who corresponded with 169 foreign nations) (decided under Exec. Order No. 12,356); Voinche v. FBI, 940 F. Supp. 323, 327 (D.D.C. 1996) (protecting information that would reveal information about application of intelligence sources or methods), aff'd per curiam, No. 96-5304, 1997 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997) (decided under Exec. Order No. 12,958), petition for cert. filed, 66 U.S.L.W. 3178 (U.S. Sept. 2, 1997) (No. 97-383); Nayed v. INS, No. 91-805, 1993 WL 524541, at *2 (D.D.C. Nov. 29, 1993) (determining that confirmation that records about plaintiff exist would reveal intelligence "method") (decided under Exec. Order No. 12,356); Allen v. DOD, 658 F. Supp. 15, 19-21 (D.D.C. 1986) (including deceased, potential, and unwitting intelligence sources) (decided under Exec. Order No. 12,356); cf.

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including confidential sources;[115] military plans, weapons, or opera

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[113](...continued)
Knight v. CIA, 872 F.2d 660, 664 (5th Cir. 1989) (finding intelligence sources and methods protected under Exemption 3).

[114] See McDonnell v. United States, 4 F.3d 1227, 1244 (3d Cir. 1993) (upholding classification of cryptographic information dating back to 1934 when release "could enable hostile entities to interpret other, more sensitive documents similarly encoded") (decided under Exec. Order No. 12,356); Gilmore v. NSA, No. C92-3646, 1993 U.S. Dist. LEXIS 7694, at **18-19, 22-23 (N.D. Cal. May 3, 1993) (finding mathematical principles and techniques in agency treatise protectible under this category of executive order) (decided under Exec. Order No. 12,356).

[115] See, e.g., Linn v. United States Dep't of Justice, No. 92-1406, 1995 WL 631847, at *26 (D.D.C. Aug. 22, 1995) (finding Exemption 1 withholdings proper because agency demonstrated it has "a present understanding" with foreign government that any shared information will not be disclosed and that information concerning the relationship between the United States and that government will remain secret) (decided under Exec. Order No. 12,356); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 2-3 (D.D.C. Aug. 11, 1995) (upon in camera review, finds documents properly withheld because disclosure would "damage relations with foreign countries"); Summers v. United States Dep't of Justice, No. 89-3300, slip op. at 8-9 (D.D.C. June 13, 1995) (ruling that disclosure of names of two foreign agents who visited FBI Director "could severely damage the delicate liaison established between the United States and this particular foreign government, as well as other governments that are similarly situated") (decided under Exec. Order No. 12,356); United States Comm. for Refugees v. Department of State, No. 91-3303, 1993 WL 364674, at *2 (D.D.C. Aug. 30, 1993) (holding that disclosure of withheld information could damage nation's foreign policy by jeopardizing success of negotiations with Haiti on refugee issues "[because] documents contain . . . frank assessments about the Haitian government") (decided under Exec. Order No. 12,356); St. Hilaire v. Department of Justice, No. 91-0078, 1992 WL 73545, at *4 (D.D.C. Mar. 18, 1992) (protecting portions of two cables between Department of State and its embassies because "[p]rotecting communications between . . . diplomatic instruments of sovereign states certainly is an appropriate reason for classifying documents") (decided under Exec. Order No. 12,356), aff'd, No. 92-5153 (D.C. Cir. Apr. 28, 1994); Van Atta v. Defense Intelligence Agency, No. 87-1508, 1988 WL 73856, at *2 (D.D.C. July 6, 1988) (protecting information compiled at request of foreign government for purpose of negotiations) (decided under Exec. Order No. 12,356); American Jewish Congress v. Department of the Treasury, 549 F. Supp. 1270, 1276-79 (D.D.C. 1982) (decided under Exec. Order No. 12,065), aff'd, 713 F.2d 864 (D.C. Cir. 1983) (unpublished table decision). But see Springmann v. United States Dep't of State, No. 93-1238, slip op. at 9-11 (D.D.C. Apr. 21, 1997) (refusing to accept agency's judgment that disclosure of information about American employee's religiously offensive behavior in Saudi Arabia would have repercussions with respect to relations between United States and that country),
(continued...)

tions;[116] scientific, technological, or economic matters relating to national security;[117] and government programs for safeguarding nuclear materials and facilities.[118]

In contrast to Executive Order 12,356, Executive Order 12,958 contains no "catch-all" provision for the classification of other categories of information.[119] In addition, Executive Order 12,958 eliminates the presumption found in the prior order that certain types of information--such as foreign government information--are classified.[120] In this regard, another very important difference is that Executive Order 12,958 instructs that if there is any "significant doubt about the need to classify information, it should not be classified."[121] By contrast, such information remained classified under Executive Order 12,356 for a period of thirty days pending a final determination.[122]

Executive Order 12,958 also contains a provision establishing an entirely new mechanism through which classification determinations can be challenged within the federal government.[123] Under this provision, "authorized holders of information"--individuals who are authorized to have access to such information--who, in good faith, believe that its classification is improper are "encouraged and

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[115](...continued)
renewed motion for summary judgment denied without issuance of final judgment (D.D.C. Aug. 6, 1997).

[116] See, e.g., Taylor v. Department of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (protecting combat-ready troop assessments) (decided under Exec. Order No. 12,065); Public Educ. Ctr., 905 F. Supp. at 21 (protecting videotapes made during raid in Somalia) (decided under Exec. Order No. 12,356); Washington Post Co. v. DOD, No. 84-2403, slip op. at 3 (D.D.C. Apr. 15, 1988) (foreign military information) (decided under Exec. Order No. 12,356); Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 659 F. Supp. 674, 679 (E.D.N.Y. 1987) (NEPA/FOIA case) (decided under Exec. Order No. 12,356), aff'd, 891 F.2d 414, 417 (2d Cir. 1989).

[117] See Exec. Order No. 12,958, § 1.5(e).

[118] See id. § 1.5(f).

[119] Compare Exec. Order No. 12,356, § 1.3(a)(10), 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 435 note (1994) ("other categories of information that are related to the national security and that require protection against unauthorized disclosure"), with Exec. Order No. 12,958, § 1.5 (no such provision).

[120] See FOIA Update, Spring/Summer 1995, at 11 (chart comparing provisions of Exec. Order No. 12,958 with those of Exec. Order No. 12,356).

[121] Exec. Order No. 12,958, § 1.2(b).

[122] Exec. Order No. 12,356, § 1.1(c).

[123] Exec. Order No. 12,958, § 1.9.

expected" to challenge that classification.[124] Furthermore, agencies are required to set up internal procedures to implement this program, in order to ensure that holders are able to make such challenges without fear of retribution.[125]

As with prior orders, Executive Order 12,958 contains a number of distinct limitations on classification.[126] Specifically, information may not be classified to conceal violations of law, inefficiency, or administrative error,[127] to prevent embarrassment to a person or an agency,[128] to restrain competition,[129] to prevent or delay the disclosure of information that does not require national security protection,[130] or to classify basic scientific research unrelated to the national

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[124] Id. § 1.9(a).

[125] Id. § 1.9(b); see also id. § 5.4(b) (authorizing Interagency Security Classification Appeals Panel to "decide on appeals by persons who have filed classification challenges").

[126] Id. § 1.8.

[127] Id. § 1.8(a)(1); see also Computer Prof'ls for Soc. Responsibility v. National Inst. of Standards & Tech., No. 92-0972, slip op. at 1-2 (D.D.C. Apr. 11, 1994) (finding no basis to conclude NSA improperly classified computer security guidelines in violation of law to "conceal its role" in developing such guidelines) (decided under Exec. Order No. 12,356), summary affirmance granted, No. 94-5153, 1995 U.S. App. LEXIS 3138, at *1 (D.C. Cir. Jan. 13, 1995); Navasky v. CIA, 499 F. Supp. 269, 275-76 (S.D.N.Y. 1980) (rejecting as irrelevant requester's claim of illegality under similar provision in prior executive order so long as information properly classified pursuant to order's substantive requirements; likewise rejecting agency's claim of national security harm based upon possible loss of employment or damage to reputation for those persons cooperating with CIA's clandestine book-publishing activities) (decided under Exec. Order No. 12,065), aff'd, 679 F.2d 873 (2d Cir. 1981) (unpublished table decision).

[128] Exec. Order No. 12,958, § 1.8(a)(2); see also Canning v. United States Dep't of Justice, 848 F. Supp. 1037, 1047-48 (D.D.C. 1994) (finding no credible evidence that FBI improperly withheld information to conceal existence of "potentially inappropriate investigation" of French citizen; "if anything, the agency released sufficient information to facilitate such speculation") (decided under Exec. Order No. 12,356); Wilson v. Department of Justice, No. 87-2415, 1991 WL 111457, at *2 (D.D.C. June 13, 1991) (rejecting requester's claim that information was classified to prevent embarrassment to foreign government official and holding that "even if some . . . information . . . were embarrassing to Egyptian officials, it would nonetheless be covered by Exemption 1 if, independent of any desire to avoid embarrassment, the information withheld [was] properly classified") (decided under Exec. Order No. 12,356).

[129] Exec. Order No. 12,958, § 1.8(a)(3).

[130] Id. § 1.8(a)(4).

security.[131] Moreover, Executive Order 12,958 specifically prohibits the reclassification of information "after it has been declassified and released to the public under proper authority."[132] Although Executive Order 12,958 authorizes the classification of a record after an agency has received a FOIA request for it, such agency action is permitted only through the "personal participation" of designated high-level officials and only on a "document-by-document basis."[133]

In addition to the substantive criteria outlined in the applicable executive order, information must also adhere to the order's procedural requirements in order to qualify for Exemption 1 protection.[134] Executive Order 12,958 prescribes the current procedural requirements to be employed by agencies; these include such matters as the proper markings to be applied to classified documents,[135] as well as the manner in which agencies designate officials to classify information in the first instance.[136]

Executive Order 12,958 contains some classification marking provisions that are different from those of any prior executive order. Most prominently, it requires that "a concise reason for classification" be stated on the face of each newly classified document.[137] It also eliminates the use of the "OADR" ("Originating Agency's Determination Required") declassification instruction for newly created documents; instead, it requires that a date or event for declassification, a date ten years from the document's creation, or the relevant declassifica-

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[131] Id. § 1.8(b).

[132] Compare Exec. Order No. 12,958, § 1.8(c) (forbidding reclassification of information once officially disclosed), with Exec. Order No. 12,356, § 1.6(c) (permitting reclassification of information if it "may reasonably be recovered").

[133] Exec. Order No. 12,958, § 1.8(d).

[134] See, e.g., Canning, 848 F. Supp. at 1048-49 (finding that agency adhered to appropriate classification procedures established by Exec. Order No. 12,356).

[135] Exec. Order No. 12,958, § 1.7; see also Cohen v. FBI, No. 93-1701, slip op. at 5-6 (D.D.C. Oct. 11, 1994) (rejecting plaintiff's argument that subsequent marking of two documents during agency's second classification review rendered FBI's classification action ineffective; to require agencies "to perform every classification review perfectly on the first attempt" would be "a very strict and unforgiving standard") (decided under Exec. Order No. 12,356).

[136] Exec. Order No. 12,958, § 1.4; see also Presidential Order of Oct. 13, 1995, 3 C.F.R. 513 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) (designating those executive branch officials who are authorized to classify national security information in first instance).

[137] Exec. Order No. 12,958, § 1.7(a)(5) (requiring that such statements include, at a minimum, specifications of relevant classification categories).

tion exemption category, be specified on the document.[138] In addition, Executive Order 12,958 mandates the use of portion markings to indicate levels of classification within documents[139] and advocates the use of classified addenda in cases in which classified information comprises "a small portion of an otherwise unclassified document."[140] Governmentwide guidelines have been issued regarding these marking requirements.[141]

Executive Order 12,958 also establishes two government entities to provide oversight of agencies' classification determinations and their implementation of the order. The first, the Interagency Security Classification Appeals Panel, consists of senior-level representatives of the Secretaries of State and Defense, the Attorney General, the Director of Central Intelligence, the Archivist of the United States, and the Assistant to the President for National Security Affairs.[142] Among other things, this body will adjudicate classification challenges filed by agency employees and will decide appeals from persons who have filed requests under the mandatory declassification review provisions of the order.[143] The second entity is the Information Security Policy Advisory Council, which is comprised of seven private-sector experts appointed by the President to serve as a formal Federal Advisory Committee for the purpose of advising the executive branch on matters of national security classification policy, such as "subject areas for systematic declassification review" and any "policy issues in dispute."[144]

Agencies with questions about the proper implementation of the substantive or procedural requirements of Executive Order 12,958 may consult with the Information Security Oversight Office (located within the National Archives and Records Administration, at (202) 219-5250), which holds governmentwide oversight responsibility for classification matters under the executive order.[145]

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[138] Id. § 1.7(a)(4).

[139] Id. § 1.7(c) (specifying that only Director of Information Security Oversight Office is authorized to grant portion-marking waivers).

[140] Id. § 1.7(g).

[141] See 32 C.F.R. § 2001.20-.24 (1996) (directive issued by Information Security Oversight Office providing detailed guidance on identification and marking requirements of Exec. Order No. 12,958).

[142] See Exec. Order No. 12,958, § 5.4(a)(1); see also 32 C.F.R. pt. 2001 app. A (1996) (bylaws of Interagency Security Classification Appeals Panel).

[143] See Exec. Order No. 12,958, § 5.4(b); see also id. § 3.6 (establishing mandatory declassification review program as non-FOIA mechanism for persons to seek access to classified information generated or maintained by agencies, including papers maintained by presidential libraries not accessible under FOIA).

[144] Id. § 5.5.

[145] See id. § 5.3; see also FOIA Update, Spring/Summer 1995, at 15 (de-
(continued...)

EXEMPTION 1

Duration of Classification and Declassification

Perhaps the most significant provisions of Executive Order 12,958 establish (1) limitations on the length of time information may remain classified[146] and (2) enhanced procedures for the declassification of older government information.[147] In contrast to Executive Order 12,356, which mandated that "information . . . be classified as long as required by national security considerations,"[148] Executive Order 12,958 sets a ten-year limit on most new classification actions.[149] It is important to note that this ten-year rule applies only to information classified after Executive Order 12,958's effective date; it does not apply to information classified under prior executive orders.[150]

Executive Order 12,958 also establishes an automatic declassification mechanism that likewise did not exist under the prior one.[151] Under Executive Order 12,356 and the legal precedents established thereunder, the passage of time did not, by itself, require agencies to declassify information automatically upon the expiration of a specified time period.[152] In contrast, Executive Order 12,958

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[145](...continued)
scribing responsibilities of current ISOO Director); FOIA Update, Winter 1985, at 1-2 (describing responsibilities of ISOO under Exec. Order No. 12,356).

[146] Exec. Order No. 12,958, § 1.6, 3 C.F.R. 333, 337-38 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and in FOIA Update, Spring/Summer 1995, at 6.

[147] See id. § 3.4.

[148] Exec. Order No. 12,356, § 1.4(a), 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 435 note (1994).

[149] Exec. Order No. 12,958 § 1.6(a) (setting forth general rule); see also id. § 1.6(d) (identifying categories of information which permit extension of classification beyond 10-year period).

[150] Id. § 1.6(e).

[151] Compare Exec. Order No. 12,958, § 3.4(a) (mandating automatic declassification for 25-year-old information), with Exec. Order No. 12,356, § 3.1(a) (specifying that passage of time alone does not compel declassification); see also Exec. Order No. 12,937, 3 C.F.R. 949 (1994) (separate executive order issued by President Clinton declassifying automatically millions of pages of older records maintained by National Archives and Records Administration).

[152] See, e.g., Oglesby v. United States Dep't of the Army, 79 F.3d 1172, 1183 (D.C. Cir. 1996) (stating that "passage of time alone is [not] enough to discredit an otherwise detailed and persuasive affidavit") (decided under Exec. Order No. 12,356); McDonnell v. United States, 4 F.3d 1227, 1243-45 (3d Cir. 1993) (rejecting plaintiff's argument that cryptographic information classified as exempt in 1934 is no longer entitled to protection because of passage of time) (decided
(continued...)

requires the automatic declassification of information that is more than twenty-five years old,[153] with exceptions limited to especially sensitive information designated as such by the heads of agencies.[154]

This major provision applies to information currently classified under any predecessor executive order[155] and will lead to creation of a governmentwide declassification database.[156] Agencies were given five years to accomplish this declassification mandate.[157] On the other hand, Executive Order 12,958 contains a provision that prohibits the automatic declassification of classified information "as a result of any unauthorized disclosure of identical or similar information."[158] The counterpart provision in the predecessor executive order prohibited the auto-

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[152](...continued)
under Exec. Order No. 12,356); Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) (stating that "passage of some thirty years does not, by itself, invalidate [agency's] showing under Exemption 1") (decided under Exec. Order No. 12,356); Afshar v. Department of State, 702 F.2d 1125, 1138 n.18 (D.C. Cir. 1983) (ruling that change in circumstances does not require review of original classification) (decided under Exec. Order No. 12,356); Campbell v. United States Dep't of Justice, No. 89-3016, 1996 WL 554511, at *6 (D.D.C. Sept. 19, 1996) (finding, despite (unspecified) age of records, agency affidavits demonstrate that excised information was properly withheld) (decided under Exec. Order No. 12,356); Canning v. United States Dep't of Justice, 848 F. Supp. 1037, 1047 (D.D.C. 1994) (rejecting plaintiff's contention that collapse of Soviet Union "so drastically alter[s] international affairs as to render FBI's [current] security concerns somehow obsolete") (decided under Exec. Order No. 12,356); Siminoski v. FBI, No. 83-6499, slip op. at 17-18 (C.D. Cal. Jan. 16, 1990) (upholding classification of documents more than 40 years old because "age alone does not mandate release of otherwise sensitive documents") (decided under Exec. Order No. 12,356).

[153] Exec. Order No. 12,958, § 3.4(a) (applying 25-year rule to classified information determined by Archivist of United States to have "permanent historical value").

[154] Id. § 3.4(b) (specifying categories of sensitive information qualifying for exception to 25-year rule--including, for example, information that would reveal identity of confidential human source, disclose U.S. military war plans still in effect, or violate statute or treaty); see also id. §§ 3.4(c), (d) (specifying manner in which agencies are to notify President of, and receive approval for, exceptions to automatic declassification).

[155] See id. §§ 1.6(e), 3.4(a).

[156] See id. § 3.8 (directing Archivist to establish database of information that has been declassified by agencies and instructing agency heads to cooperate in this governmentwide effort).

[157] Id. § 3.4(a).

[158] Id. § 1.2(c).

matic declassification of information "as a result of any unofficial publication or inadvertent or unauthorized disclosure of . . . identical or similar information."[159]

For records that fall within any exception to Executive Order 12,958's automatic declassification mechanism, agencies are required to establish "a program for systematic declassification review" that focuses on any need for continued classification of such records.[160] By contrast, under Executive Order 12,356, such agency programs were entirely voluntary, except for at the National Archives and Records Administration, which holds responsibility for large volumes of long-classified files.[161]

As did prior executive orders, Executive Order 12,958 establishes a "mandatory declassification review program."[162] This mechanism allows any

[159] Exec. Order No. 12,356, § 1.3(d).

[160] Exec. Order No. 12,958, § 3.5(a).

[161] Exec. Order No. 12,356, § 3.3(a).

[162] Exec. Order No. 12,958, § 3.6.